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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 662.

DAMPSKIBSSELSKABET DANNEBROG, a corporation, Claimant of the Motorship "Stjerneborg," and AKTIESELSKABET BORGESTAD, a corporation, Claimant of the Motorship "Brand," *Petitioners*,

v.

SIGNAL OIL AND GAS COMPANY OF CALIFORNIA, a corporation, *Respondent*.

BRIEF OF PETITIONERS.

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

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INTRODUCTION.

This brief on the merits of the questions to be reviewed is supplemental to petitioners' brief supporting their petition for writ of certiorari in this matter.

OPINIONS BELOW.

The opinion in the District Court written by Judge E. E. Cushman is reported in 25 Fed. Supp. 594. It was filed December 7, 1938 (R. 154-163).

The opinion in the Circuit Court of Appeals for the Ninth Circuit (Wilbur, Haney and Healy) written by Judge B. E. Haney, is reported in 106 Fed. (2d) 896. It was filed October 26, 1939 (R. 222-227).

JURISDICTION.

Jurisdiction of this Court is invoked under Judicial Code Sec. 240 (a), as amended (Acts of February 13, 1925, ch. 229, sec. 1, 43 Stat. 938; January 31, 1928, ch. 14, sec. 1, 45 Stat. 54; June 7, 1934, ch. 426, 48 Stat. 926); 28 U. S. C. A. sec. 347 (a).

The decree of the Circuit Court of Appeals for the Ninth Circuit to be reviewed was entered October 26, 1939 (R. 228, 229). The petition for writ of certiorari was filed on January 22, 1940. Order of this Court granting such writ was entered February 26, 1940.

PARTIES.

The petitioners before this Court are foreign corporations—the Norwegian owner of the motorship "Brand," and the Danish owner of the motorship "Stjerneborg" (R. 10-13). In the Circuit Court of Appeals they were appellants; in the District Court they were claimants of the respondent vessels.

The respondent before this Court is the Signal Oil & Gas Company of California, a California corporation (R. 5, 7). In the Circuit Court of Appeals it was appellee; in the District Court it was libelant.

STATEMENT OF THE CASE.

The case involves the determination of the existence or absence of a maritime lien.

The Facts.

In September, 1932, the respondent Signal Oil & Gas Company of California, as seller, entered into a formal

long-term contract (R. 45-53; Ex. A) with "Anglo Canadian Shipping Coy. Ltd. of Canada," as buyer, covering the future sale and purchase of fuel oil for "any vessels which the buyer may own, charter, operate or be agents for" during the designated term (R. 31, 46).

In May, 1933, said contract was modified by letters to permit W. L. Comyn & Sons, a corporation, as an independent, additional buyer, to purchase fuel oil for "any and all vessels owned, chartered and/or operated by" it (R. 32, 58; Ex. D). Under said contract as modified the respondent Signal Oil & Gas Company became obligated to sell; and W. L. Comyn & Sons became entitled to buy upon its own order and upon its own credit (R. 32, 33, 58, 59, 60, 61, 62; Ex. D, E, F, G).

Such contract, as originally executed and as so modified, used no language which stated or implied that the respondent Signal Oil & Gas Company, in thus obligating itself to future sales and deliveries of fuel oil was relying on the credit of any vessel or upon a maritime lien (R. 45-53; 58-63). Such contract allowed to W. L. Comyn & Sons liberal credit, extended in time to forty days and unlimited in amount (R. 49, 58). As respondent's exclusive protection against the buyer's development of an unsatisfactory credit status or its non-payment for past credit purchases, such contract provided that respondent might require the buyer to pay cash upon future deliveries, or might suspend deliveries pending full payment, or might terminate the contract (R. 49).

Long after the execution and the modification of said contract, W. L. Comyn & Sons became the charterer of the motorship "Stjerneborg" in January, 1934, and of the motorship "Brand" in March, 1934 (R. 126, 114; Ex. P-2, Ex. O-2). Both charter parties required that the charterer "shall provide and pay for all" fuel oil (R. 40, 116, 124, 136).

Later, under said contract as so modified, the respondent filled two orders issued by W. L. Comyn & Sons, as buyer, for delivery of fuel oil to the "Brand" at Point Wells,

Washington, on April 26, 1934, and at San Pedro, California, on May 11, 1934 (R. 37, 38). Also under said contract as so modified, the respondent filled another order issued by W. L. Comyn & Sons, as buyer, for delivery of fuel oil to the "Stjerneborg" at Astoria, Oregon, on May 15, 1934 (R. 38, 39). Such orders were made solely by W. L. Comyn & Sons which was related to said vessels merely as charterer under said charter parties (R. 39, 40). None of such orders for fuel oil was made by either the master or the chief engineer of either vessel (R. 40). None of such orders was made by the foreign owner of either vessel—as a factual matter (R. 37, 38, 39, 40).

Both before and after said contract was modified to constitute W. L. Comyn & Sons as a buyer thereunder, the respondent either knew, or easily could have ascertained, that W. L. Comyn & Sons was in business, not as an owner of vessels, but only as an operator, sometimes for owner's account and sometimes for charterer's account (R. 41).

In addition, as connected with the fuel oil supplied to the "Brand," on April 26, 1934, at the time of the first delivery, and again on May 11, 1934, at the time of the second delivery, the chief engineer notified respondent that the oil was "*for time charterer's account*" by endorsement on the delivery receipt (R. 37, 38). What previous similar notice may have been given respondent by W. L. Comyn & Sons is not disclosed because its original order as to the "Brand" has never been located (R. 37). As connected with the fuel oil supplied to the "Stjerneborg" on May 15, 1934, the original order from W. L. Comyn & Sons by letter dated May 1, 1934, notified respondent that such vessel was "*at present on our time charter*" (R. 38, 39).

Hence, by general knowledge and by specific notice, respondent was acquainted with the relationship of W. L. Comyn & Sons to the vessels as charterer and was chargeable with the charter party limitations upon its authority to pledge the credit of the vessels (R. 37, 38, 39, 40, 41).

Resulting from a protracted strike among longshoremen on the Pacific Coast, W. L. Comyn & Sons became finan-

cially embarrassed and ultimately failed to make payment for the fuel oil which it bought to supply the "Brand" and the "Stjerneborg" (R. 41).

The Proceedings.

A libel in rem was filed against the "Stjerneborg" in May, 1935, and against the "Brand" in June, 1935, by which respondent asserted a maritime lien for the contract purchase price (R. 4-10). After attachment upon process the vessels were released by bonds filed in behalf of the petitioners as owners (R. 10-19).

By their answers, the petitioners appropriately denied the allegations of said libels as to a maritime lien and affirmatively alleged in defense that no such lien existed:

(1) because under all the terms of said contract the fuel oil was sold and delivered upon the sole credit of W. L. Comyn & Sons, and not upon the credit of the vessels;

(2) because under the provisions of said charter parties W. L. Comyn & Sons was obligated to "provide and pay for all" fuel oil, and was without authority to pledge the credit of the vessels (R. 21, 22, 27, 28).

Because of the similarity of facts involved and the identity of the legal questions presented, the two cases were consolidated for trial (R. 31).

The facts were submitted to the District Court by stipulation in lieu of evidence (R. 31-153). After its memorandum decision (R. 154-163), that court adopted such stipulation as its findings in each case (R. 164, 166) from which it drew separate conclusions of law (R. 164, 166) and on which it based separate decrees (R. 170-174).

By such conclusions and decrees the District Court declared and foreclosed a maritime lien against each vessel (R. 163-166; 170-174).

To all such rulings, exceptions were duly filed in behalf of petitioners and were duly allowed by that court (R. 167-170; 174-176).

For economy and convenience the two causes were consolidated for appeal (R. 207).

Petitioners appealed to the Circuit Court of Appeals for the Ninth Circuit in the manner required by applicable statutes and rules (R. 189-218). Incidental to such appeal they filed "Statement of Points" (R. 215-217) which included the following—

> "(1) No maritime lien was created:
>
> "(a) The terms of the charter parties covering the respondent vessels obligated the charterer to pay for fuel oil, and did not authorize or empower the charterer, upon whose order appellee supplied fuel oil, to pledge the credit of the respondent vessels;
>
> "(b) The fuel oil was sold to the charterer and was delivered to the respondent vessels by appellee under its general sales contract with the charterer, not upon the credit of the vessels themselves, but upon the personal credit of the charterer.
>
> "(2) Maritime lien, if any, was waived:
>
> "(a) By the terms of the appellee's general contract with the charterer for the future sale of fuel oil; * * *."

SPECIFICATION OF ASSIGNED ERRORS.

Of the Assignments of Error in the two cases on the appeal to the Circuit Court of Appeals for the Ninth Circuit (R. 197-204), petitioners rely in this court upon those specified, as follows:

1. The District Court erred by holding that the stipulated facts showed that the fuel oil was furnished upon the credit of the vessels and resulted in the creation of a maritime lien. Assignment of Error No. 1 (R. 197); Assignment of Error No. 1 (R. 201).

2. The District Court erred by failing to hold that the fuel oil was furnished the vessels solely upon the personal credit of the charterer and that no maritime lien was cre-

ated. Assignment of Error No. 7 (R. 199); Assignment of Error No. 6 (R. 202).

3. The District Court erred by failing to hold that under the terms of the charter parties covering the vessels at the time the fuel oil was furnished by respondent, the charterer possessed no power or authority to pledge the credit of the vessels or to create a maritime lien against the same. Assignment of Error No. 15 (R. 200); Assignment of Error No. 13 (R. 203).

4. The District Court erred by failing to hold that, under the terms of the general contract for the sale and purchase of fuel oil between respondent and the charterer of the vessels, no maritime lien was contemplated or could arise. Assignment of Error No. 14 (R. 200); Assignment of Error No. 12 (R. 203).

5. The District Court erred by directing and entering decrees awarding and foreclosing a maritime lien against the vessels. Assignments of Error Nos. 5, 12, 16 (R. 198, 199, 200); Assignments of Error Nos. 4, 10, 14 (R. 202, 203).

QUESTION PRESENTED.

The question presented for determination by this Court is the existence or absence of a maritime lien under sec. 30 of the Merchant Marine Act of June 5, 1920 (46 U. S. C. A. secs. 971-975; quoted in Appendix).

This ultimate question in this particular case tenders for decision two separate questions:

1. Whether the fuel oil was furnished in reliance by respondent upon the credit of the vessels as a prerequisite to delivery thereof—this question arises from the antecedent contract for the future sales and purchases between respondent and the buyer, who later became the charterer of the vessels. This is a question of credit.

2. Whether the charterer in ordering fuel oil was empowered by the owners of the vessels to pledge their credit

and create a lien thereon—this question arises from the subsequent charter parties which required that the charterer itself "shall provide and pay for all" fuel oil (R. 40). This is a question of authority.

Although apparently confused by both lower courts, these two questions are independent and distinct.

If either of these questions is resolved in favor of petitioners, the vessel owners, the maritime lien fails.

ARGUMENT.

I—OIL CONTRACT NEGATIVED LIEN.

To summarize argument in relation to the first question, petitioners contend that the general contract for future sale and purchase of fuel oil negatived contemplation of and reliance upon a maritime lien by respondent. This contract expressly designated respondent's rights against its buyer in case the latter defaulted in payment. But it made no reservation of or reference to any lien; it created no obligation by the vessel owners; and provided no remedy against the vessels. It lawfully bound respondent to furnish, upon the sole order and upon the individual credit of the buyer, W. L. Comyn & Sons, all fuel oil required for "any and all vessels owned, chartered, and or operated" later by that concern, during the full life of the contract (R. 32, 33, 45-53, 58; Ex. A, Ex. D). It preserved in respondent no legal right of refusal to supply fuel oil upon the order and credit of its buyer, in the event that a subsequent charter party or operating agreement failed to empower W. L. Comyn & Sons to create a maritime lien, or in the event that the credit of some vessel for any of many reasons was worthless. Respondent's general contract makes directly applicable that provision of the maritime law which says that, "nothing in this section shall be construed to prevent the furnisher of * * * supplies * * * from waiving his *right* to a lien * * * at any time, by agreement or otherwise * * *." (Subsec. S of Sec. 30, Merchant Marine Act of June 5, 1920; 46 U. S. C. A. 974; Appendix.) Petitioners

contend that by this contract effective as to W. L. Comyn & Sons in May, 1933 (R. 32, 33), respondent then waived its *right* to a maritime lien; and that, therefore, no lien arose from fuel oil deliveries in April and May, 1934, made to vessels subsequently chartered by W. L. Comyn & Sons (R. 114, 126) and made exclusively upon the order and the credit of the charterer in the performance of said general contract (R. 33, 37-40). In such contention petitioners are fortified, because respondent required that, "this contract and the interpretation hereof shall be governed by the laws of the State of California" (R, 52). By this provision respondent incorporated, as controlling, a body of state law incapable of authorizing the very lien asserted by its libels (R. 5, 8); and excluded the Federal maritime law alone capable of granting such a lien. (Subsec. T of Sec. 30, Merchant Marine Act of June 5, 1920; 46 U. S. C. A. 975; Appendix.)

In initiating amplification of this argument, petitioners invite review of some previous expressions by this Court as to the maritime lien.

The President Arthur, 279 U. S. 564, was decided May 20, 1929. In that case a maritime lien was asserted for coal furnished under formal contracts signed by the vessel owner itself, wherein the supplier in advance of delivery exacted security and payment in the form of trade acceptances signed by responsible third parties as endorsers. To the extent of these facts the decision is not wholly in point. However, in its opinion, this Court made observations bearing upon present considerations.

The opinion commented that:

> "Neither contract referred to any lien on the vessel; and each recited that 'the entire contract between the parties is stated above and there is no outside condition, warranty, agreement or understanding'." (279 U. S. 566.)

Then, after indicating that the case involved a question of whether the maritime lien had been waived by the sup-

plier in its original contracts with the vessel owner prior to delivery of the coal, the opinion continued:

> "As to the first of these questions it is necessary to consider the provisions of the Maritime Lien Act of 1910, relating to liens for necessaries, which were re-enacted in the Ship Mortgage Act of 1920. Subsec. P of the latter Act provides that: 'Any person furnishing repairs, supplies . . . or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.' Subsec. S provides that: 'Nothing in this section shall be construed to prevent the furnisher of repairs, supplies . . . or other necessaries . . . from waiving his right to a lien . . . at any time, by agreement or otherwise . . .'
>
> "Prior to the Act of 1910 it had been settled that by the maritime law as administered in this country a lien was given for necessaries furnished a vessel in a port of a foreign country or state upon the credit of such vessel; but that no such lien was given for necessaries furnished in the home port or state. *The Roanoke*, 189 U. S. 185, 193.
>
> "The purpose of the Act of 1910, as shown by the Reports of the Committees of Congress, was to do away with this 'artificial distinction' and 'the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence no lien arises'; and 'to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and necessaries.' *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 11.
>
> "To this end the Act gave a maritime lien on any vessel, whether foreign or domestic, for necessaries furnished on the order of the owner or his authorized agent, and relieved the libellant from the necessity of alleging or proving that credit was given to the vessel. The Committee reports show, however, that it was not

intended to make any other change in the general principles of the existing law of maritime liens, *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, *supra*, p. 11; and the specific provision that the Act should not be construed as preventing the furnisher of the necessaries from waiving his right to a lien, 'by agreement or otherwise,' indicates clearly, we think, that it was not intended to change the principles of the maritime law in respect thereto. That an express renunciation of the lien is not essential, is plain.

"We need not enter here into the general field of the waiver of maritime liens. Such liens differ in their character and are not equally favored—the lien for necessaries, which is a secret one, being *stricti juris*, *Piedmont Coal Co.* v. *Seaboard Fisheries Co.*, *supra*, 12. It suffices to say that we think the principles applicable to the question whether the lien was waived by the contracts entered into here, are aptly indicated in the following cases, which, in the main, were analogous in their facts to the present case, and were decided by members of this Court, sitting at circuit.

"In *Murray* v. *Lazarus*, 1 Paine 572, 17 Fed. Cas. 1049, 1051 (1826), the libellants made a special agreement with the master for the payment of their advances for repairs and supplies furnished the vessel in a foreign port, and took from him a bill of exchange drawn upon the agents of the owner. Thompson, Circuit Justice, in holding that the libellants had no lien for these advances on the freight monies received by the owners, said: 'When an express contract has been entered into for the payment of such expenses, that must be resorted to, and will be considered a waiver of such implied lien if any existed. And a party who has waived his right in this respect cannot be permitted, at a subsequent time, and under a change of circumstances to reinstate himself in his former condition to the injury of others . . . If this is to be considered a regular and ordinary bill of exchange, it was a substitution for any lien that might have existed, and must be considered a relinquishment thereof.'

"In *Phelps* v. *The Camilla*, Taney, 400, 19 Fed. Cas. 441, 445 (1838), the libellants furnished the agents of the vessel in a foreign port copper which was used in repairing the vessel. The sale was made on a written

order of the agents that made no mention of the vessel or her owners. The copper was charged to the agents, and they gave the libellants their negotiable note, which was not paid. The libellants claimed that the charge to the agents had been made by mistake, and some months later changed the account on their books and charged the copper to the ship and her owners. Taney, Circuit Justice, finding upon the evidence that the copper was sold to the agents upon their personal credit and was not furnished upon the credit of the brig and her owners, held that the libellants had no lien, but added: 'It must not, however, be understood, that the decision would be different, if the copper had been originally charged to The Camilla and her owners. It is true, that upon such a sale, the libellants would, in the first instance, have acquired a lien upon the brig; but that lien, in my opinion, would have been waived by taking afterwards the note of (the agents) . . . If the party does not choose to rely on the contract which the maritime law implies in such cases, but takes an express written contract, he must rely on the contract he makes for himself, and cannot, upon a change of circumstances, resort to the securities upon which, in the absence of any special agreement, the law presumes that he relied; and if he takes a note or bill of exchange, or any other personal engagement, for the payment of the debt, he is presumed to rely on this personal security, and to waive his lien, unless he stipulates that the liability of the vessel shall still continue.'

"In *Leland* v. *Medoja*, 2 Woodb. & M. 92, 15 Fed. Cas. 298, 299 (1846), Woodbury, Circuit Justice, speaking of the lien for repairs on a vessel, said that 'if the evidence . . . shows, that the ship was not relied on originally, though foreign, but the master or owners or other security were, the lien does not attach any where, or under any form.' *The Maitland*, 2 Hagg. Adm. 253; The Nestor (1 Sumner (U. S. C. C.) 73)."

"In *The Ann C. Pratt*, 1 Curt. 340, 1 Fed. Cas. 947, 950 (1853), Curtis, Circuit Justice, in holding that there was no maritime lien for advances to the master of the vessel in a foreign port to make necessary repairs that had been secured by a void bottomry bond, said, citing *The Nestor* and other cases: 'that the lien

created by the maritime law may be, and is, waived by the creditor, by any act or contract which is inconsistent with an intention to receive or retain that lien.' The decree in this case was affirmed in *Carrington* v. *Pratt*, 18 How. 63, 68, in which this Court said that 'it is well settled that the lien implied by the general admiralty law, may be waived by the express contract of the parties, or by necessary implication; and the implication arises in all cases where the express contract is inconsistent with an intention to rely upon the lien. A familiar instance is where the money is advanced or repairs made, looking solely to the personal responsibility of the owner or master.'

"In *Taylor* v. *The Commonwealth*, 23 Fed. Cas. 756, 757 (1875), the libellant, before making repairs on the vessel at her home port, had entered into a written contract specifying that they were to be paid for partly in cash and partly in endorsed notes, that is, negotiable notes, with personal security. Miller, Circuit Justice, in holding that under these circumstances there was no lien on the vessel for the repairs, said: 'I have no doubt of the fact that a man doing that kind of work may rely on the owner of the vessel, and that if he makes no specific contract on the subject, he will have a right against the owner and the vessel—; But that is a lien which the law implies from the circumstances and if a specific contract is made which shows that the party relied upon other security and other modes of payment, then he cannot enforce the admiralty lien. If is very clear to me, here, that (the libellant) in making this contract, never intended to rely on the security of the vessel itself, because he made this contract for the very best kind of other payment. . . . I think, having made an express contract for an express security, he cannot say, "I did this work on the credit of the vessel." In other words, I think if there is any question of admiralty lien, that it must have been the intention in the mind of the party who furnishes the supplies and repairs whether in a home or foreign port, to rely on the credit of the vessel. . . . If it can be shown that he did not rely on that alone, and that he intended to rely on other security, which he supposed sufficient, or which was supposed to be better, then he had no lien, because the lien arises from implication, from the

fact expressed or implied that the man, in furnishing the supplies or contracting a debt, relied on the vessel as security, and if he relied on anything else it is another security sufficient, or supposed to be, which, in case that turned out to be insufficient, does not restore his lien.'" (279 U. S. 567-571.)

* * * * * * * * *

"Applying the principles stated in the foregoing cases, we think that the libellant, having made specific contracts for an express security, instead of resting on the lien which the law would otherwise give, must rely on the contracts it made for itself, and cannot now, in a change of circumstances, resort to the lien it would have had in the absence of the special agreements; and that by taking other and different security, upon which it relied, and which it still retains, without stipulating for the retention of the lien, it has waived the lien which it otherwise would have had." (279 U. S. 572.)

The case of *Piedmont & Georges-Creek Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, was decided by this Court October 11, 1920, based on transactions occurring before Subsections P, Q, R, S, and T of Section 30 of the Merchant Marine Act of June 5, 1920, had substantially reenacted the Maritime Lien Act of June 23, 1910 (36 Stat. 604, ch. 373).

In that case, a coal company agreed to sell coal to the owner of some nineteen vessels and certain factories, the coal to be delivered into the owner's storage bins on shore and to be used by the owner for both the vessels and the factories. This Court was required to decide whether the coal was furnished to the vessels by their owner upon its order or by the coal company. Despite their understanding that the latter was entitled to a lien on the vessels, this Court held to the contrary.

While the facts involved and the question resolved in that case were not the same as those presented here, in reaching its conclusion the opinion recited maritime lien history and principles which petitioners emphasize.

"To hold that a lien for the unpaid purchase price of supplies arises in favor of the seller merely because the purchaser, who is the owner of a vessel, subsequently appropriates the supplies to her use would involve abandonment of the principle upon which maritime liens rest and the substitution therefor of the very different principle which underlies mechanics' and materialmen's liens on houses and other structures. The former had its origin in desire to protect the ship; the latter mainly in desire to protect those who furnish work and materials. *The maritime lien developed as a necessary incident of the operation of vessels. The ship's function is to move from place to place.* She is peculiarly subject to vicissitudes which would compel abandonment of vessel or voyage, unless repairs and supplies were promptly furnished. Since she is usually absent from the home port, remote from the residence of her owners and without any large amount of money, it is essential that she should be self-reliant—that she should be able to obtain upon her own account needed repairs and supplies. The recognition by the law of such inherent power did not involve any new legal conception, since the ship had been treated in other connections as an entity capable of entering into relations with others, of acting independently and of becoming responsible for her acts. *Because the ship's need was the source of the maritime lien it could arise only if the repairs or supplies were necessary; if the pledge of her credit was necessary to the obtaining of them; if they were actually obtained; and if they were furnished upon her credit.* The mechanic's and materialman's lien, on the other hand, attaches ordinarily although the labor and material cannot be said to have been necessary; although at the time they were furnished there was no thought of obtaining security upon the building; and although the credit of the owner or of others had in fact been relied upon. The principle upon which the mechanic's lien rests is, in a sense, that of unjust enrichment. Ordinarily, it is the equity arising from assumed enhancement in value resulting from work or materials expended upon the property without payment therefor which is laid hold of to protect workman and others who, it is assumed, are especially deserving, would ordinarily fail to provide by agree-

ment for their own protection and would often be unable to do so." (254 U. S. 8, 9, 10.) * * *

"It is urged by the Coal Company that it was the intention of Congress in passing the act (Maritime Lien Act of June 23, 1910) to broaden the scope of the maritime lien and that the construction of the act adopted by the Circuit Court of Appeals renders the statute inoperative in an important class of cases which it was intended to reach. The language of the statute affords no basis for the latter assertion, and the Reports of the Committees of Congress (Senate Report, No. 831, 61st Cong., 2d sess.) show that it is unfounded. Those reports state that the purpose of the act was this: *First*, to do away with the artificial distinction by which a maritime lien was given for supplies furnished to a vessel in a port of a foreign country or state, but denied where the supplies were furnished in the home port or state. *The General Smith*, 4 Wheat. 438. *Second*, to do away with the doctrine that, when the owner of a vessel contracts in person for necessaries or is present in the port when they are ordered, it is presumed that the materialman did not intend to rely upon the credit of the vessel, and that hence, no lien arises. *The St. Jago de Cuba*, 9 Wheat. 409. *Third*, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. *Peyroux* v. *Howard*, 7 Pet. 324. The reports expressly declare that the bill makes 'no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.' The act relieves the libelant of the burden of proving that credit was given to the ship when necessaries are furnished to her upon order of the owner, but it in no way lessens the materialman's burden of proving that the supplies in question were furnished to her by him upon order of the owner or of some one acting by his authority. The maritime lien is a secret one. It may operate to the prejudice of prior mortgagees or of purchasers without notice. It is therefore *stricti juris* and will not be extended by construction, analogy or inference. *The Yankee Blade*, 19 How. 82, 89; *The Cora P. White*, 243 Fed. Rep. 246, 248." (254 U. S. 11, 12.)

Returning to the facts in the present case, the long term fuel oil contract (R. 45-53; Ex. A) between "Anglo Canadian Shipping Coy. Ltd. of Canada" and Signal Oil & Gas Company of California, which was modified to include W. L. Comyn & Sons as a buyer, contained material provisions as follows:

"Article I. The Seller hereby sells to the Buyer and the Buyer buys from the Seller for delivery during a period of fifteen months * * * all Fuel Oil and Fuel Oil 27 Plus * * * which may be required by the buyer, during said period for the current fuel purposes of any vessels which the buyer may own, charter, operate or be agents for during said period, the said oil, up to the quantity specified to be the fuel exclusively used during the said period for the said purposes.

"This contract shall remain in full force and effect from and after the expiration date above named until one hundred and eighty day's written notice shall have been given by one party to the other of its intention to terminate the same, provided that such notice shall not be given by either party prior to the expiration date, above named. * * *

"Article IV. The said oil shall be delivered by the Seller on the orders of the Buyer to said vessels at the Standard Oil Company of California's plants at the waterfront, San Pedro and Richmond, California; Astoria and Willbridge (Portland), Oregon; Aberdeen and Point Wells, Washington; at Panama Canal Oil Crib, Balboa and Cristobal, Canal Zone, and or by barge to vessels along the waterfront, San Pedro and or San Francisco, California, in three thousand (3,000) barrel lots or less at option of Seller.

"Article V. The price and or prices which the Buyer shall pay to the Seller in Gold Coin of the United States of America * * *";

"Article VI. The Buyer shall pay the Seller on or before the 10th of each calendar month for all deliveries made hereunder during the preceding calendar month. If at any time the Buyer shall fail to make any payment due hereunder or if the credit of the Buyer shall for any cause be deemed unsatisfactory by the

Seller the Seller may, before making further deliveries, require the Buyer to pay for said oil with each order or may suspend deliveries hereunder until such payment has been made or may terminate this contract. No such suspension or termination shall affect the obligations of the Buyer hereunder and such failure to pay shall be deemed a breach of this entire contract.

"Article VII. The inspection of said oil for determination of quantity and quality shall be made in the presence of properly accredited representatives of the Buyer and the Seller at time of each delivery. If properly accredited representatives of the Buyer are not present at such time of inspection then the Seller's measurements and determinations of quantity and quality shall be deemed correct and no oil shall be rejected or claim as to quantity or quality allowed therefor after delivery thereof. * * *

"Article X. In the event of a breach of this contract by either the Seller or the Buyer, the measure of the estimated requirements of the said oil herein agreed to be used for the unexpired term of this contract shall be the average monthly use of oil during the months that oil was used for the purposes above stated, not exceeding twelve (12) months next preceding such termination, and the damages for such breach by either the Seller or the Buyer shall be the difference, if any, between the price herein fixed and the market price of the undelivered oil at the nearest market to the place of delivery and at the time of the breach; if there be no such difference, the Seller's damages for such breach shall be the Seller's loss of profits on such undelivered oil. All claims for special consequential or other damages, different from those hereinabove set forth are hereby waived. * * *

"Article XI. (a) This contract and the interpretation hereof shall be governed by the laws of the State of California.

"(b) This contract shall not be assignable by act of the Seller or Buyer, or by operation of law, and shall not be deemed an asset in, and at the option of either party shall terminate in the event of, any voluntary or involuntary receivership, bankruptcy or insolvency proceedings.

"(c) This instrument contains the entire contract. There are no oral promises, representations or warranties affecting it. * * *" (Ex. A; R. 45-53)

As previously recited, this contract was modified to include W. L. Comyn & Sons as a buyer in May, 1933, by exchange of letters (R. 58-63; Ex. D, E, F, G) which contained provisions as follows:

"With reference to the contract between this company and yourselves dated September 26, 1932, covering the purchase and sale of fuel oil and fuel oil 27 plus for delivery beginning October 1, 1932, and ending December 31, 1933, and thereafter until terminated by 180 days written notice from either party to the other, it is hereby understood and agreed that said 180 days notice will not be given by either of us prior to July 1, 1934.

"The contract is further modified to include the fuel oil requirements of any and all vessels owned, chartered and or operated by Dominion Commonwealth Line and or Cascade Line and or W. L. Comyn & Sons.

"The contract quantity shall be increased up to but not exceeding 500,000 barrels.

"Articles IV and V of the contract with regard to delivery points and prices shall be and the same are hereby amended to include deliveries at dock Honolulu, T. H., at a price of * * *.

"Said contract as above modified, and all of the terms and provisions thereof, is hereby ratified and confirmed." (Ex. D; R. 58, 59)

"It is our understanding that you will, of course, bill Messrs. W. L. Comyn & Sons direct for the quantity which may be used for his Cascade Line and or his own service. You will bill us for that oil which is ordered through the name of the Dominion Commonwealth Line and the Anglo Canadian Shipping Coy., Ltd." (Ex. F; R. 60, 61)

These extracts of the contract between respondent and W. L. Comyn & Sons (R. 45-53, 58-63; Ex. A, D, E, F, G) show:

(1) That W. L. Comyn & Sons was the actual buyer designated and treated as such;

(2) That the oil was to be delivered on the order of the buyer;

(3) That the oil was to be sold and deliverd to the buyer for "*any and all vessels owned, chartered and/or operated by*" the buyer;

(4) That respondent was obligated to sell and deliver for a fixed minimum period which could not be terminated before July 1, 1934;

(5) That respondent was obligated to sell and deliver any amount up to 500,000 barrels;

(6) That the buyer was to pay for the oil;

(7) That the buyer was expressly granted credit until "the 10th of each calendar month for all deliveries made hereunder during the preceding calendar month"—credit extension of as much as 40 days;

(8) That the remedy of the seller and the penalty of the buyer for the buyer's default in payment was expressly provided to be that "The seller may, before making further deliveries, require the buyer to pay for said oil with each order, or may suspend deliveries hereunder until such payment has been made, or may terminate this contract";

(9) That, to the exclusion of the vessel or vessel owner, the buyer alone was allowed the right to inspect the oil on delivery and to make claim on account of quantity or quality;

(10) That "in the event of a breach of this contract by buyer or seller" the measure of damages was specified, but no clause contemplated breach of the contract by the vessel or its owner, or provided a remedy against the vessel or its owner;

(11) That respondent's contract was obligatory upon respondent in May, 1933, before the buyer's relation to the vessels as charterer had been created, and *before respondent could possibly know whether the buyer would acquire*

any power to subject such vessels to a maritime lien for respondent's protection;

(12) That respondent's contract gave to respondent no right to require of the buyer any information concerning the buyer's relation to the vessel, nor its authority from the vessel owner with respect to the buyer's power to create a lien thereon, nor with respect to any other fact or circumstance material to respondent in determining whether, if oil were supplied to such vessel, the respondent *could* acquire the security of a maritime lien:

(13) That respondent's contract *reserved* to respondent *no right to refuse to make delivery of oil* because the vessel might depart from the jurisdiction before the expiration of the buyer's credit period or because the vessel might be owned in a foreign country with no certainty of return to any United States port, or because the value of the vessel or the amount of encumbrance thereon might afford respondent little or no security, or because the buyer's charter or operating agreement might prohibit a lien, or because some other condition or circumstance might exist preventing respondent from the probability of satisfaction out of the vessel;

(14) That respondent's contract failed to employ any phrase or word even inferentially suggestive of an intention to rely upon the credit of the vessel;

(15) That respondent's contract expressly excluded the maritime lien as protection against the buyer's nonpayment by providing that "*This instrument contains the entire contract; there are no oral promises, representations or warranties affecting it,*" and by providing also that "*This contract and the interpretation hereof shall be governed by the laws of the State of California*"—since the laws of the State of California could not extend to respondent the benefit of a maritime lien, which could arise only under the maritime laws of the United States (46 U. S. C. A. 975);

(16) that a pledge of the credit of any vessel was not a necessary element in the receipt of oil by such vessel from respondent under its contract with W. L. Comyn & Sons.

Apart from the express provisions of respondent's contract, its course of dealings thereunder with W. L. Comyn & Sons discloses that prior to the charterer's orders for delivery of oil to the "Brand" and the "Stjerneborg" for which recovery is sought in this cause, respondent had made many sales to W. L. Comyn & Sons under such contract, all upon a credit basis (R. 63, 64; Ex. H). As to credit, respondent had placed no restriction upon its buyer except to limit the period of credit to the time then allowed by the NRA Code (R. 65, 72, 73; Ex. J, Q).

Again, apart from the express provisions of the contract, the record fails to show that at any time did respondent, prior to making a sale to its buyer or a delivery to some designated vessel, conduct any investigation concerning the relation of W. L. Comyn & Sons to the vessel to be supplied with oil. The course of dealings between respondent and its buyer shows that the latter ordered oil for a named vessel usually by letter or telegram, some times giving to respondent no information whatsoever and some times merely describing the vessel as one under charter. In no instance did respondent's reply correspondence make any inquiry about the vessel or about its buyer's authority to represent or obligate the vessel. And in no instance did respondent reject any order.

The written orders for fuel oil by W. L. Comyn & Sons and the written acceptances of those orders by respondent under its contract, both before and after the deliveries to the "Brand" and the "Stjerneborg" involved in this case, all reflect a course of dealings in which respondent was relying solely upon the personal credit of its buyer (Ex. B-1, C-1, D-1, F-1, G-1, H-1, I-1, J-1, K-1, L-1, M-1, N-1, O-1, P-1, Q-1, R-1, S-1, T-1, U-1, C-2, D-2, H-2, I-2, J-2, K-2, L-2; R. 83-109). At no time did respondent show any anxiety except as to the personal credit of W. L. Comyn & Sons and its promptitude in payment. Nevertheless, re-

spondent did know that W. L. Comyn & Sons "was in business not as a vessel owner, but as a commission merchant, a freight contractor and broker, and as an operator of vessels, some times for owner's account and some times for charterer's account" (R. 41). In other words, entirely apart from its formal contract, at the time of making sales to its buyer and deliveries to vessels designated by the buyer, respondent never knew whether a lien *could* legally arise as the result of the fuel oil being supplied.

In harmony with the respondent's practices in dealing with W. L. Comyn & Sons under its contract, respondent in February, 1934, prior to the deliveries of oil to the "Brand" and the "Stjerneborg," entered the name of W. L. Comyn & Sons upon its sale register so that after that all sales were formally entered in such register under the name of W. L. Comyn & Sons (R. 33, 34).

With respect to the particular deliveries upon which respondent asserts a maritime lien, the sales were made as items in the course of dealings just reviewed. As to the "Brand", as far as known, the buyer's order for oil conveyed no information to respondent. However, at the time of making delivery to the "Brand" on April 26, 1934, the receipt for the oil evidencing the quantity delivered was endorsed by the chief engineer with the phrase "For time charterer's account". This same phrase likewise appeared on the similar receipt when a subsequent delivery of oil was made to that vessel by respondent on May 11, 1934 (Ex. A-2, F-2; R. 100,104). As to the "Stjerneborg," the order of W. L. Comyns & Sons resulting in delivery of oil by respondent on May 15, 1934, recited that such vessel was "At Present on our Time Charter" (Ex. H-2; R. 106). With such specific notice as to the limited relationship between the vessels and W. L. Comyn & Sons, still respondent made no inquiry and expressed no hesitancy because of lack of information and disclosed no unwillingness to make deliveries on its buyer's personal credit (Ex. N-1, O-1, C-2, D-2, H-2, I-2, J-2, K-2, L-2; R. 93, 94, 102, 103, 106-109).

Further, with respect to the course of dealings under respondent's contract with W. L. Comyn & Sons concerning payment for deliveries made on the buyer's order, the record contains correspondence showing that respondent billed W. L. Comyn & Sons directly, as a result of the understanding between the three parties to the contract. Anglo Canadian Shipping Coy. Ltd. in May, 1933, wrote to respondent, saying "It is our understanding that you will, of course, bill Messrs. W. L. Comyn & Sons direct for the quantity which may be used" by that concern (Ex. F; R. 60). A letter from W. L. Comyn & Sons to respondent written in July, 1933, said: "We would ask, if it is possible, that you bill us directly for oil supplied for our account to vessels of our fleet, or, in other words, bill us and not the Anglo Canadian Shipping Coy. Ltd. (Ex. I; R. 65). And, subsequently, respondent wrote to W. L. Comyn & Sons saying: "Our billing department has had some difficulty in determining which invoices should be made out to your company and which should be made out to Anglo Canadian Shipping Co.; we have now made arrangements with our order department whereby this difficulty will be eliminated in the future" (Ex. L; R. 68). The correspondence evidencing this practice and containing respondent's demand for payment, with respect to which the buyer was some times delinquent, is consistent with the provisions of the formal contract and with respondent's extension of personal credit to W. L. Comyn & Sons (R. 34).

Out of harmony with the terms of respondent's formal contract and all its practices thereunder, the record contains only one isolated fact in respondent's course of dealings consistent with respondent's contention that it relied on the credit of the vessel—the fact that respondent included the name of the vessel in its invoices. However, all invoices were sent to W. L. Comyn & Sons, and the record wholly fails to show that at any time respondent ever delivered any invoice to the vessel owner or ever requested that any invoice be relayed to the vessel owners. Respondent's

custom of addressing its invoices to the vessel and owners appears to have been a mere gesture, reflective of some usage in its accounting department, having possible value and utility as to other sales not made under blanket contracts like that granted to Anglo Canadian Shipping Coy. Ltd. and W. L. Comyn & Sons. But even if respondent's habit of naming the vessel and owners in its invoices be credited with a different origin, still it can have small weight when compared with all of its other practices and the express terms of its formal contract all harmonious with respondent's reliance solely upon the personal credit of W. L. Comyn & Sons.

Upon all of the pertinent facts and circumstances shown by the record, petitioners contend that because respondent did, by the terms of its blanket contract and by its course of dealings thereunder, rely solely upon the individual credit of W. L. Comyn & Sons, no maritime lien arose against the vessels. Petitioners conceive that the expressions of this Court in *The President Arthur*, 279 U. S. 564, and in *Piedmont etc. Coal Co.* v. *Seaboard Fisheries Co.*, 254, U. S. 1, extend support to their position.

Both the respondent here and the supplier of the coal in *The President Arthur*, *supra*, made extended written contracts fixing the rights and obligations surrounding the contemplated sales and deliveries of fuel. Both contracts omitted any reservation of or any reference to a lien. Each contract contained express provision excluding all understanding outside the document.

In *The President Arthur*, *supra*, comment was made upon these facts as tending to mitigate against the lien. This Court there said: "That an express renunciation of the lien is not essential, is plain" (279 U. S. 568).

While, as previously noted, in *The President Arthur*, *supra*, this Court held the maritime lien had been renounced by the supplier because it had exacted third party endorsements on trade acceptances as security for the price of the fuel, nevertheless, the principle applied in that case is appli-

cable to the facts of the present litigation. There the supplier was contracting directly with the vessel owner; there the supplier demanded security other than the vessel owner's credit. In this case, the supplier was contracting not with the vessel owner but with a third party who later became merely a charterer; and in contracting with W. L. Comyn & Sons and in obtaining its personal obligation, respondent acquired security other than the credit of the vessel owner. Hence, what was said by this Court in *The President Arthur*, *supra*, as to the supplier's relinquishment *in limine* of the *right* to a maritime lien is applicable to respondent's contract with W. L. Comyn & Sons.

To briefly repeat:

> "Applying the principles stated in the foregoing cases, we think that the libellant, having made specific contracts for an express security, instead of resting on the lien which the law would otherwise give, must rely on the contracts it made for itself, and cannot now, in a change of circumstances, resort to the lien it would have had in the absence of the special agreements; and that by taking other and different security, upon which it relied, and which it still retains, without stipulating for the retention of the lien it was waived the lien which it otherwise would have had." (*The President Arthur*, 279 U. S. 572)

Even more closely related to the present case are the statements of this Court in *Piedmont etc. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, where the opinion reviewed the source of the maritime lien, contrasted common law liens, observed that the character of the maritime lien remained essentially unaltered by the 1910 Act, and categorically listed certain peculiar elements of such a lien for the future guidance of inferior admiralty courts which had been exhibiting some confusion.

To reiterate in part:

> "*Because the ship's need was the source of the maritime lien, it could arise only*

"(1) *if the repairs or supplies were necessary;*

"(2) *if the pledge of her credit was necessary to the obtaining of them;*

"(3) *if they were actually obtained;*

"(4) *and if they were furnished upon her credit.*"

(Italics and paragraph numerals supplied.) *Piedmont etc. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, 9.

As related to these listed requisites of the maritime lien, petitioners are not claiming that the fuel was not actually received aboard the vessels, or that the fuel was not needed by the vessels. However, petitioners are strenuously contending that two of these elements were not inherent in the deliveries to the "Brand" and the "Stjerneborg". Petitioners assert:

(1) That to obtain fuel oil deliveries from respondent under its contract with W. L. Comyn & Sons it was not necessary that the credit of any vessel be pledged;

(2) That the oil deliveries made to the vessels were actually not made upon the credit of the vessels.

The provisions of respondent's contract and its course of dealings with W. L. Comyn & Sons weigh overwhelmingly in favor of the conclusion that the respondent sold and delivered upon the credit of its buyer and not upon the credit of the vessels. Considering the contract provision obligating respondent to supply fuel oil for "any and all vessels owned, chartered and or operated by" W. L. Comyn & Sons at some future time, it is impossible to logically conclude that a pledge of the credit of the vessels was necessary in order that those vessels might be furnished with fuel oil, since respondent had become legally bound to sell and deliver more than half a year prior to the execution of the charter parties covering the "Brand" and the "Stjerneborg". And it is patent that until such charter parties were negotiated and effective, respondent could not know

whether its buyer would be empowered to pledge the credit of those vessels.

The only contingency contemplated by respondent's contract because of which it might ever have been necessary for any vessel operated by W. L. Comyn & Sons to have pledged its own credit in order to obtain fuel oil was the contingency that the personal credit of W. L. Comyn & Sons had become so dissipated as to prompt respondent to exercise its contract right to require W. L. Comyn & Sons to pay cash for fuel oil on delivery with the latter being unable to comply. Then, and then only, might a vessel, under the operation of W. L. Comyn & Sons, have been compelled to resort to the vessel's own credit. But this contingency never occurred.

In maintaining its claim for a maritime lien, respondent's brief in the Circuit Court of Appeals placed principal reliance upon three cases:

The Portland, 273 Fed. 401 (C. C. A. 9—1921).
The Golden Gate, 52 Fed. (2d) 397 (C. C. A. 9—1931)
The Excrosa, 93 Fed. (2d) 732 (C. C. A. 1—1937)

Of course, these cases are not binding upon this Court. However, as viewed by petitioners they did not turn upon the point now under discussion.

It is true that in *The Portland*, 273 Fed. 401, the supplier contracted with a vessel operator for future sales and purchases of fuel oil to be delivered to designated vessels, and that later the S. S. Portland was chartered and was subsequently supplied with fuel oil. But an examination of the opinion, supplemented by a review of the briefs, fails to show that the litigants presented or the Circuit Court of Appeals decided the contention being urged here by petitioners.

In behalf of the owner of the S. S. Portland it was argued that in view of the operator's contract with the supplier, the oil was delivered upon the procurement of the operator

(then the charterer) and not "upon the order of the owner" as required by the statute. By the opinion of the Circuit Court of Appeals it was decided simply that, whether the order for the fuel oil came from the charterer or from the master of the vessel, the owner's authority to order the fuel oil existed because such authority was not negatived by the charter party. That court's opinion said:

> "* * * No lien accrues if such persons did not have authority to bind the ship, and such lack of authority was known, or ought to have been known, to the furnisher of supplies. To apply the law to the circumstances of the present case is quite simple. The supplies were furnished at San Francisco, Oleum, and Balboa, upon the order of the master of the Portland. This being the case, the libelant established a prima facie right to a lien to be upheld, unless the claimant showed facts which withdrew the case from the general provisions by proving that the furnisher knew or by the exercise of reasonable diligence could have ascertained that because of the terms of the charter party, or for any other reason, the master was without authority to bind the ship." (*The Portland*, 273 Fed. 403)

In this case there was no adjudication of the question of the supplier's credit reliance upon the charterer or the supplier's relinquishment *in limine* of its right to a lien by the terms of its sales contract. There the court was wholly concentrated upon the question of authority arising out of the charter party.

Again, in *The Golden Gate*, 52 Fed. (2d) 397, there is no consideration or decision as to the effect of a blanket sales contract upon the existence of a maritime lien. As in the earlier case before the same Circuit Court of Appeals, it was primarily weighing whether authority existed in the master of a chartered vessel to pledge its credit. On this point, the opinion cited *The Portland, supra;* also it cited *The South Coast*, 251 U. S. 519, as being conclusive. But *The South Coast, supra*, involved no contract between the the supplier and the charterer; it involved only the construction of the charter party itself.

It is true that in *The Golden Gate*, 52 Fed. (2d) 397, the opinion made bare mention of a fuel oil contract between the supplier and the charterer. But such mention was made merely to fortify the court's ruling in respect to the charter party. The opinion of the Circuit Court of Appeals said:

> "Furthermore, the contract of sale between the charterer and the libelant contained the following provision: 'It is agreed between the parties hereto that seller sells said fuel *on the credit of the several vessels* to which deliveries may be made hereunder, as well as on the promise of buyer to pay therefor.'" (*The Golden Gate*, 52 Fed. (2d) 400)

From this quotation it is apparent that if the Circuit Court of Appeals for the Ninth Circuit was influenced in any degree by the sales contract between the supplier and the charterer, the case is not in point, since the terms of the contract there are in direct contrast to the terms of the contract between the respondent and W. L. Comyn & Sons. In the one case, the supplier made an express provision preserving its lien; in the other case, it made express provisions tantamount to a relinquishment of its lien.

As to *The Everosa*, 93 Fed. (2d) 732, upon which respondent also relied in the appellate court, while the opinion in that case makes recitals disclosing a somewhat comparable general contract for the sale and purchase of coal between the supplier and the charterer of the vessel, the First Circuit Court of Appeals makes no ruling upon the existence or non-existence of a maritime lien as the result of such contract. The scope of the court's inquiry and conclusion was confined to a question as to the time when title to the coal passed. The opinion of the court itself says as much:

> "The decisive question is whether in each instance title to the coal passed at Boothton, or not until the coal was put on board at Mobile. It is to be determined, as both parties agree, on the Alabama Sales Act, (citation) as interpreted by the Supreme Court of that state." (p. 734) * * * We think that the District Judge fell into clear error in the holding that the title to the coal passed to the Munson Line at Boothton and consequently that

no lien arose. (p. 735)" (*The Everosa*, 93 Fed. (2d) 732, 734, 735)

Nevertheless, in fairness to respondent and to this Court, admission is due that in *The Everosa, supra*, there did exist between the supplier of the coal and the charterer a contract with some terms comparable to provisions in the fuel oil contract between respondent and W. L. Comyn & Sons. It was because of such similarity that the trial court denied a lien to the supplier. (*The Everosa*, 18 Fed. Sup. 186) However, petitioners are entitled to observation that the question decided by the District Court was apparently lost in the Circuit Court of Appeals by its interest in the question as to when title passed—a question analogous to that decided by this Court in *Piedmont etc. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1.

Unlike *The Everosa, supra*, the court in *The Cratheus*, 263 Fed. 693 (C. C. A. 5), seemed influenced in its denial of a maritime lien by the supplier's sales contract binding it to furnish all fuel required by its buyers for "steamers of which they are owners, charterers or time charterers, or in which they are otherwise interested" (P. 693).

Thus far, argument of petitioners has been addressed mainly to those aspects of respondent's fuel oil contract with W. L. Comyn & Sons which show that respondent intended to rely upon the personal credit of its buyer as the source of future payment; that respondent was definitely committed to sell to W. L. Comyn & Sons long before the charters covering the "Brand" and the "Stjerneborg" were executed; and that respondent was legally bound to make oil deliveries on the order of its buyer regardless of the latter's lack of future authority to pledge the credit of those vessels. All these phases of respondent's contract were inconsistent with a present intention by respondent to acquire the protection of a maritime lien. And all these considerations are important in view of the holding of this Court "that an express renunciation of the lien is not essential." (*The President Arthur*, 279 U. S. 658)

Although an express relinquishment of the martime lien is not necessary to petitioners' position, respondent in fact inserted into its sales contract as originally effective with Anglo Canadian Shipping Coy., Ltd., a provision which was the practical equivalent:

> "This contract and the interpretation hereof, shall be governed by the laws of the State of California" (R. 52; Ex. A)

This agreement respecting the applicable laws was continued effective in the contract as modified with W. L. Comyn & Sons, by the understanding that:

> "Said contract as above modified, and all of the terms and provisions thereof, is hereby ratified and confirmed." (R. 58, 59; Ex. D)

With respect to this clause as to the law governing the contract, principles of contract interpretation require that it be accorded full operative effect, in the absence of other language within the contract forcing a limitation upon the otherwise plain meaning.

As a necessary consequence, respondent actually renounced the maritime lien—a result unavoidable, since upon the well recognized principle of the maritime law, entrusted to the Federal government to preserve uniformity, no state is permitted to create a maritime lien enforceable in rem by proceedings in admiralty.

Upon this point this Court, referring to the Maritime Lien Act of 1910, and the Congressional Committee reports, stated that one of the purposes of the Act was:

> "Third, to substitute a single federal statute for the state statutes in so far as they confer liens for repairs, supplies and other necessaries. *Peyroux* v. *Howard*, 7 Pet. 324. The reports expressly declare that the bill makes 'no change in the general principles of the present law of maritime liens, but merely substitutes a single statute for the conflicting state statutes.'" (*Piedmont etc. Coal Co. v. Seaboard Fisheries Co.*, 254 U. S. 11)

Perhaps this quotation is superfluous, since the Act of 1920, by which the Act of 1910 was carried forward with slight modification, contains express provision to the same effect:

> "This section shall supersede the provisions of all state statutes conferring liens on vessels, in so far as such statutes purport to create rights of action to be enforced by suits in rem in admiralty against vessels for repairs, supplies, towage, use of dry dock or marine railway and other necessaries." (46 U. S. C. A. sec. 975)

Reviewing the fuel oil contract in an attempt to sense respondent's serious purpose for inserting the clause under consideration, it would appear that respondent, having in mind California as its own corporate domicile, and having in contemplation deliveries of fuel oil to vessels designated by Anglo Canadian Shipping Coy., Ltd. of Canada in various jurisdictions named in the contract (California, Oregon, Washington, Canal Zone and Hawaiian Islands—R. 48, 58) elected for the sake of uniformity and for reasons of advantage best known to itself, to require that its dealings be governed by the laws of California, to the exclusion of the state laws operative in Washington and Oregon, to the exclusion of the federal laws operative at the Canal Zone, to the exclusion of the federal and territorial laws operative in the Hawaiian Islands, and to the exclusion of the maritime laws of the United States. It would seems to petitioners that no other conclusion can be reached, in view of the fact that if respondent desired any other laws than those of the State of California to be operative in respect to its contract or the interpretation thereof, it was a most simple matter to make express provision therefor so long as that subject was being covered by express agreement. Hence, petitioners contend that whatever conclusion this Court may reach as to the effect of other provisions within respondent's fuel oil contract inconsistent with reliance upon a maritime lien, it must be logically held that the California laws, having been made applicable by respondent for its

own benefit, respondent is bound by its choice and may not now disregard the provision in order to obtain a lien which the laws of the State of California were incapable of creating in respect to a maritime transaction.

With respect to the power of respondent to choose the law by which its contract rights and obligations were to be governed, the textbooks and judicial opinions harmonize in recognition of the principle that parties to a contract may select the controlling law in the absence of fraudulent purpose or prohibitive public policy. (Page on Contracts, 2nd Edition, sec. 3571, p. 6171; Page on Contracts, 2nd Edition, sec. 2048, p. 3543; 12 C. J. 451; 13 C. J. 247, 248, 251, 423; 6 R. C. L. sec. 243, p. 855; Carver on Carriage of Goods by Sea, 8th Edition, sec. 210, p. 315.) On this subject, in a suit upon a marine insurance policy, this Court said:

> "* * * the interpretation of the contract was intended by the parties to depend upon the principles of English law as they obtained and were recognized in England by the usages prevailing at Lloyds. This is what the parties expressly stipulated for and it is no injustice to the company to decide its rights according to the principles of the law of the country which it has agreed to be bound by so long as, in a case like this, the foreign law is not in any way contrary to the policy of our own. See *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* (*'The Montana'*) 129 U. S. 397, 446, 453 (32: 788, 794, 796)." *London Assurance* v. *Companhia de Moagens, etc.*, 167 U. S. 149, 162.

In another decision by this Court it appeared that a bill of lading executed in the United States for carriage of goods on a British ship contained a provision exempting the carrier from negligence, a clause valid under the British law but invalid under the maritime laws of the United States for reasons of public policy. Relative to the rights of the parties to agree with respect to the law governing their contract, in the absence of restrictions created by public policy, this Court said that the contract was to be governed by the law of the place where made "unless the parties when entering into the contract clearly manifest a mutual inten-

tion that it shall be governed by the law of some other country". *Liverpool etc. v. Phenix Ins. Co.*, 129 U. S. 397, 462. The same principle is recognized by this Court in *Boseman v. Connecticut General Life Insurance Co.*, 301 U. S. 196, and in *Pritchard v. Norton*, 106 U. S. 124.

From the authorities generally, it appears that, aside from certain exceptions not applicable here, the established rule permits parties by their agreement to determine the law which shall govern their contract. Respondent by its fuel oil contract with Anglo Canadian Shipping Coy., Ltd., and with W. L. Comyn & Sons required that such contract and its interpretation should be governed by the laws of the State of California. Since under numerous decisions of the admiralty courts and since by Federal statute (46 U. S. C. A. Sec. 975) state legislation may not create maritime liens to be enforced in rem, it would appear useless to inquire relative to the exact provisions of the laws of the State of California concerning a lien, since if the California law authorizes a maritime lien it is invalid, and if the California law authorizes a non-maritime lien, respondent is not seeking to foreclose that lien in the pending litigation (R. 5, 8).

If it be argued in behalf of respondent that by operation of law the maritime laws of the United States were an implied part of respondent's general contract, complete answer would seem contained within the contract itself, for respondent not only inserted the clause expressly incorporating the laws of the State of California, but also respondent inserted another clause expressly excluding other laws by providing that "this instrument contains the entire contract" (Ex. A; R. 53). It is submitted that proper interpretation of respondent's contract leaves no room for any such contention. Respondent's agreement dealt with the subject of the applicable controlling laws both inclusively and exclusively by saying that the "contract and the interpretation hereof shall be governed by the laws of the State of California," and by saying that "this instrument contains the entire contract".

In the Circuit Court of Appeals, respondent argued that when it inserted the provision that "this contract and the interpretation hereof shall be governed by the laws of the State of California," it tacitly and impliedly added the phrase "and the laws of the United States," because some Federal laws are uniformly operative within the boundaries of all states. But this contention violates the well recognized rule of interpretation to the effect that words employed in a contract shall be accorded their natural, normal meaning, unless otherwise clearly shown to have been intended. Petitioners submit that the normal, natural meaning of the phrase "the laws of the State of California" is just that—and not also the laws of the United States. Petitioners submit that such would have been the meaning of the phrase both to laymen and to lawyers, in the absence of modifying context.

Although petitioners are not attempting to invoke the laws of the State of California as governing the rights of respondent and petitioners in the present litigation, this Court may desire to be advised, as did the Circuit Court of Appeals, with respect to whether in 1933 when respondent's contract with W. L. Comyn & Sons became effective, or later in 1934, when respondent made delivery of fuel oil, the laws of the State of California did or did not include a lien statute. In response to this possible inquiry, the fact is that as of those dates the statutes of the State of California did include provisions which purported to allow a right of state lien against a vessel for necessaries supplied within that jurisdiction, to-wit, 1937 Deering Civil Procedure and Probate Code, Sections 813-827 (enacted in 1872 and amended in 1873-74).

It thus appears that petitioners, in urging their contention that respondent's oil contract negatived its reliance upon the credit of the vessels, are presenting a question of first impression so far as this Court is concerned. In the opinion of petitioners, none of the cases upon which respondent contends to the contrary are persuasive on the point. Petitioners submit that the decision upon this phase of the

case by the Circuit Court of Appeals for the Ninth Circuit is out of harmony with maritime lien principles as declared in the maritime lien statutes and as recognized by this Court in *Piedmont etc. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U. S. 1, and in *The President Arthur*, 279 U. S. 564.

II—CHARTER PARTIES PROHIBITED LIEN

To summarize argument in relation to the second question, petitioners contend that the charter parties made between themselves, as vessel owners, and W. L. Comyn & Sons, as charterer, invested no authority in the charterer to pledge the credit of the vessels for fuel oil, and hence, necessarily prevented the creation of a maritime lien through any purchase thereof by the charterer from the respondent. In the charter parties, the petitioners required and W. L. Comyn & Sons consented: "That the charterers shall provide and pay for all" fuel oil (R. 40, 116, 124, 128, 136). By this agreement all duty to make provision and payment for fuel oil was shifted from the owners to the charterer, which latter, alone, carried the burden of effecting the requisite supplies and of satisfying the resulting debts. Since respondent had knowledge that W. L. Comyn & Sons was not a vessel owner, but merely a charterer or an operator, and since respondent had notice of the particular charter parties covering the "Brand" and the Stjerneborg," it was chargeable with the charterer's lack of authority to bind the petitioners and to pledge the credit of their vessels (R. 41, 37, 38, 39). These facts make directly applicable that provision of the maritime law which says that: "Nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, * * * or for any other reason, the person ordering the * * * supplies * * * was without authority to bind the vessel therefor." (Subsec. R of Sec. 30, Merchant Marine Act of June 5, 1920; 46 U. S. C. A. 973; Appendix.)

Upon this second main contention of petitioners before this Court, neither the District Court (R. 157) nor the Circuit Court of Appeals (R. 226) bestowed any extended discussion. The Circuit Court of Appeals merely cited as controlling its own former decisions in *The Portland*, 273 Fed. 401, and in *The Golden Gate*, 52 Fed. (2d) 397; and observed that these cases had been reexamined by it in *The Luddco*, 66 Fed. (2d) 997. As demonstrated by the petition for writ of certiorari in the pending case (pp. 7, 8, 16, 17), the two earlier decisions of the Circuit Court of Appeals for the Ninth Circuit are in direct conflict with *The Cratheus*, 263 Fed. 693, decided by the Circuit Court of Appeals for the Fifth Circuit.

Since these conflicting decisions attempted to harmonize with the controlling law as declared by this Court and cited its decision in *The South Coast*, 251 U. S. 519, the opinions of this Court may be appropriately analysed first.

The Ninth Circuit Court of Appeals justified the allowance of a maritime lien both in *The Portland*, 273 Fed. 401, and in *The Golden Gate*, 52 Fed. (2d) 397, by reliance upon *The South Coast*, 251 U. S. 519, decided in 1920. In that case, the opinion was written by Mr. Justice Holmes, who noted that a libel *in rem* was filed for supplies furnished to a vessel under bare charter which was met by an answer denying that the master had authority to obligate the vessel by his order for necessaries. The opinion observed that by the charter party it was agreed that the charterer was "to save the owner harmless from all liens or expenses that it might be put to in consequence of such liens" (p. 522); and that the charterer was "to discharge within thirty days any debts which were liens upon it" (p. 522). After considering these special express provisions, the opinion concluded that:

> "The charter-party recognizes that liens may be imposed by the charterers and allowed to stand for less than a month and there seems to be no sufficient reason for supposing the words not to refer to all the ordinary

maritime liens recognized by the law." (*The South Coast*, 251 U. S. 523)

Based upon the conclusion thus stated this Court held that a maritime lien existed against the "S. S. South Coast."

The most recent ruling by this Court as to a maritime lien for necessaries, requiring the construction of a charter party, is *U. S.* v. *Carver*, 260 U. S. 482, decided in 1923. There again the opinion was written by Mr. Justice Holmes. In this case a maritime lien was claimed for supplies ordered not by the master but by the charterer's port captain. The charter parties involved provided that the charterer "will not suffer nor permit to be continued any lien, encumbrance, or charge which has or might have priority over the title and interest of the owner in said vessel" (pp. 487, 488). The supplier knew of no facts tending to show that the charterer was not the owner; but the supplier made no effort to ascertain the relationship of the charterer to the vessels.

In holding that no lien existed, the opinion said:

> "The Act of 1910, by which the transactions with the Clio were governed, after enlarging the right to a maritime lien and providing who shall be presumed to have authority for the owner to procure supplies for the vessel, qualifies the whole in sec. 3 as follows: 'but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.' We regard these words as too plain for argument. They do not allow the material-man to rest upon presumptions until he is put upon inquiry, they call upon him to inquire. To ascertain is to find out by investigation. If by investigation with reasonable diligence the material-man could have found out that the vessel was under charter, he was chargeable with notice that there was a char-

ter; if in the same way he could have found out its terms he was chargeable with notice of its terms. In this case it would seem that there would have been no difficulty in finding out both. The ship Mortgage Act of 1920 repeats the words of the Act of 1910.

"But it is said that the charter-party if known would have shown that the master at least, if not the agent who ordered the supplies, had authority to impose a lien, since the charter-party contemplated the possibility of one being created and provided for its removal. *The South Coast*, 251 U. S. 519, is cited as establishing the position. *But there is a sufficient difference in the language employed there and here to bring about a different result. In The South Coast the contract went no farther than to agree to discharge liens within a month. Here the primary undertaking was that 'the charterers will not suffer nor permit to be continued any lien,' &c.* We read this as meaning will not suffer any lien nor permit the same to be continued. Naturally there are provisions for the removal of the lien if in spite of the primary undertaking one is imposed or claimed. *But the primary undertaking is that a lien shall not be imposed.*" (Italics supplied.) (*U. S.* v. *Carver*, 260 U. S. 488-490)

Petitioners suggest that in *U. S.* v. *Carver*, *supra*, Mr. Justice Holmes was releasing gentle criticism of his own former opinion in *The South Coast*, *supra;* or, at least, that he was carefully guarding against the language of his earlier opinion being given any broader interpretation than intended. He plainly restricted the decision in *The South Coast*, *supra*, to the particular charter provisions there involved, which were expressly distinguished from the charter clauses presented in the later case.

Since both these decisions (*U. S.* v. *Carver*, 260 U. S. 482; *The South Coast*, 251 U. S. 519) were controlled by special phraseology in the charter parties, petitioners submit that neither is a precedent to which this Court must adhere in the present case.

In the absence of any other decision by this Court construing charter party terms remotely comparable as bear-

ing upon the assertion of a maritime lien since the passage of the Acts of 1910 and 1920, petitioners refer to *The Valencia*, 165 U. S. 264, decided in 1897, and *The Kate*, 164 U. S. 458, decided in 1896. In both those cases the pertinent charter party provisions were the same as the provision in the "Brand" and "Stjerneborg" charters. In both cases this Court held that the charter party invested the charterer with no authority to subject the vessel to a maritime lien.

In *The Valencia*, 165 U. S. 264, a lien was claimed by the supplier of coal delivered to the vessel upon the order of the charterer. The opinion recited that "the corporation operated the steamship under a charter requiring it 'to provide and pay for all the coals'" (p. 265). Also the opinion recited that the supplier was not aware of the existence of the charter party, but nevertheless made no inquiry as to the relations surrounding the vessel or the solvency of the concern ordering the coal. The opinion observed that the supplier in that case (as in the pending litigation) made out its invoices not only to the charterer but also to the "S. S. Valencia and Owners, New York." After such observations as to the facts, before discussion of the legal principles, the opinion said:

> "No fact proved in the case warranted the inference that either the master or the charterer agreed to pledge the credit of the vessel for the coal." *The Valencia*, 165 U. S. 265, 266

Following consideration of previous decisions by various courts the opinion concluded:

> "Under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him, at his own cost, to provide for necessary supplies and repairs, may pledge the credit of the vessel, it is not necessary now to determine. We mean only to decide, at this time, that one furnishing supplies or making repairs on the order simply of a person or corporation acquiring the con-

trol and possession of a vessel under such a charter party cannot acquire a maritime lien if the circumstances attending the transaction put him on inquiry as to the existence and terms of such charter party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim." *The Valencia*, 165 U. S. 272, 273.

In the opinion of this Court just reviewed it cited with approval its own earlier opinion in *The Kate*, 164 U. S. 458. There the supplier of coal sought to enforce a lien both under a New York statute and also under the maritime law. From the recitals of fact in the opinion, it appears that, differing from respondent in the pending litigation, the supplier charged the coal on its books of account not only to the charterer but also to the vessels. After the buyer of coal had become indebted to the supplier for various prior purchases the supplier consented to continue making sales and deliveries upon the understanding that under the New York lien statute it would file certain specifications of lien by which the parties assumed that the supplier was obtaining protection. The concern making purchases of coal from the supplier was both an owner and a charterer of the vessels. "The Kate" was a chartered vessel. The quotations from the charter party made by the opinion of this Court indicate that in many provisions it was comparable to the charter parties covering the "Brand" and the "Stjerneborg." The particular clause obligating the charterer as to fuel was identical. The charter party as to the "Kate" required: "That the charterer shall provide and pay for all the coals * * *" (p. 460).

From the opinion in this case it appears that the supplier knew or could easily have learned that the "Kate" and certain other vessels were operated under charter by the buyer of the coal and that no inquiry was made to ascertain the actual facts, the supplier being satisfied to make no distinction between vessels owned by the buyer and vessels chartered by the buyer. The coal was furnished

upon the order of the charterer. In selling the coal the supplier in fact relied upon the credits of both the charterer and the vessel.

By way of conclusion, the opinion said:

> "Touching the first of these grounds, the contention of the libellant is, that the stipulation in the charter party binding the charterer to pay for all coal was only an executory agreement, for the breach of which the owner could hold the charterer personally responsible; that the law will not permit the owner and the charterer, by agreement, express or implied, to withdraw the vessel from the operation of a lien in favor of those who furnish supplies to it in a foreign port; that even actual knowledge, upon the part of the person furnishing supplies, that the charterer had agreed himself to furnish, at his own expense, the coal needed by the vessel, was wholly immaterial under the New York statute.
>
> "We are of opinion that, as the libellant knew, or, under the circumstances, is to be charged with knowledge, that the charter party under which the Kate was operated obliged the charterer to provide and pay for all the coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libellant in fact furnished the coal upon the credit both of the charterer and of the vessel. *As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense was known or could have been known to the libellant by the exercise of due diligence on its part. Under the circumstances, the libellant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in bad faith to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel.* Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892. The master of a ship is regarded as 'the confidential servant or agent of the owners, and

they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessaries furnished for her use. This rule is established as well upon the implied assent of the owners, as with a view to the convenience of the commercial world.' *The Aurora*, 1 Wheat. 95, 101. 'The vessel must get on,' and 'the necessities of commerce require, that when remote from the owner, he (the master) should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests.' *The St. Iago de Cuba*, 9 Wheat. 409, 416; *The J. E. Rumbell*, 148 U. S. 1. When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. But no such necessity can be suggested, and no such reasons urged, in support of an implied lien for supplies furnished to a charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel.

"There are many cases in which the recognition or rejection of liens under the maritime law have depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel. As they throw light upon the present inquiry, it is proper to refer to some of them." (Pp. 465, 466) (Italics supplied). * * *

"The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtain-

ing the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required that he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

"If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less is one recognized under the law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them." (Pp. 469, 470) * * *

It is unnecessary for the decision of this case to consider whether the statute of New York, if interpreted as claimed by the libellant, would be repugnant to the commerce clause of the Constitution. *We decide only that libellant has no lien on the vessel under the maritime law*, and that the statute of New York, reasonably construed, does not assume to give a lien where supplies are furnished to a foreign vessel upon the order of the charterer, with knowledge upon the part of the person or corporation furnishing them, that the charterer does not represent the owners, but by contract with them has undertaken to furnish such supplies at his own cost." (P. 471) (Italics supplied) The Kate, 164 U. S. 465-471.

Thus, it develops that this Court has previously construed the same charter party provision which is the gist of the controversy between respondent and petitioners.

The facts in *The Valencia, supra,* and in *The Kate, supra,* were in many respects much more favorable to the supplier than the facts upon which respondent must rely in the present case. Yet in both instances this Court held that no lien existed because the charterer was not authorized to bind the vessel for fuel by a charter which required it "to provide and pay for all coals."

Neither in *The South Coast, supra,* nor in *U. S.* v. *Carver, supra,* did this Court discuss the earlier decisions in *The Valencia, supra,* and in *The Kate, supra*—doubtless for the reason that the later cases involved very different issues for interpretation. Further, nothing was said in the more recent cases which reflected any disapproval of the principles or the conclusions of the older opinions. Therefore, since this Court has joined with the Congressional Committee Reports (254 U. S. 11) in indicating that the Acts of 1910 and 1920, except in particulars not here material, made no basic change in the elements of the lien for vessel necessaries as recognized by the general maritime law, this Court's rulings in *The Valencia, supra,* and in *The Kate, supra,* continue to be authoritative. But those rulings were disregarded by the Ninth Circuit Court of Appeals in *The Portland,* 273 Fed. 401, and *The Golden Gate,* 52 Fed. (2d) 397.

In those two cases by the inferior appellate court it expressly relied upon *The South Coast,* 251 U. S. 519, which was considered as being controlling. However, with all due respect, petitioners suggest that because of the particular charter party clause involved there *The South Coast, supra,* was simply not in point in those cases and is not now applicable in the pending case. In this opinion petitioners are supported by *The Crathens,* 263 Fed. 693 (C. C. A. 5) which discussed *The South Coast, supra,* shortly after it was decided and reported.

In that case coal was ordered by the charterer, not by the master of the vessel; and the supplier could easily have ascertained that the charter party obligated the charterer "to provide and pay for all coal" (p. 694). Like the "Brand" and "Stjerneborg" charters it said nothing

about the charterer discharging liens. The District Court had denied a maritime lien. On the basis of these facts, when the Circuit Court of Appeals was asked to allow a maritime lien in favor of the supplier because of the decision in *The South Coast, supra*, it said:

> "There are material differences between the facts of the instant case and those of the case of South Coast S. S. Co., Claimant v. Rudbach (March 1, 1920) 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. ——. In the case cited the supplies were furnished to the ship on the order of its master under authority given by the charterers, and the charter party recognized that liens might be imposed by the charterers. In the instant case the coal was ordered, not by the master, but by the charterers, who were not expressly or impliedly given authority to subject the vessels to liens for supplies. The case cited is not authority for the proposition that a vessel may be subjected to a lien for the price or value of supplies furnished to a charterer who is without authority to bind the vessel or its owner therefor. The coal now in question having been procured, not by any one having authority to bind the vessel for it, but by the charterers, who, under the terms of the charter party, were, as the furnisher understood, required to pay for such supplies, it is not material that the furnisher thought that the vessel was responsible.
>
> "The conclusion being that the ruling complained of was not erroneous, the decree is affirmed." *The Cratheus*, 263 Fed. 695.

Two years after its decision in *The Cratheus, supra*, the Fifth Circuit Court of Appeals again held that the same charter party language was insufficient to give a charterer authority to create a lien, in the case of *Pensacola S. Co.* v. *U. S. Shipping Board*, 277 Fed. 889.

Within other federal jurisdictions petitioners are supported in their conclusion that *The South Coast, supra*, is not in point and that *The Portland, supra*, and *The Golden Gate, supra*, were erroneously decided by the Ninth Circuit Court of Appeals. *The Pajala*, 7 Fed. Supp. 618 (E. D. N. Y. 1934) is illustrative. There the facts were similar to those

in the pending case. While that litigation never reached the Second Circuit Court of Appeals, in the District Court it was held that a like charter party did not serve the supplier as a basis for a lien. And after discussing the conflict of decisions at some length, the District Court concluded by saying:

> "The choice of following the law as announced in this court, rather than the two decisions in the Ninth Circuit, is deliberate and in the belief that correction, if it be appropriate, lies elsewhere." *The Pajala*, 7 Fed. Supp. 621.

The strained and artificial rule upon the charter point under discussion, adopted by the Ninth Circuit Court of Appeals, has often been questioned or disapproved: *The Thordis*, 290 Fed. 255; *Ville de Djibouti*, 295 Fed. 869; *The Dictator*, 18 Fed. (2d) 131; *The Ben Lawers*, 42 Fed. (2d) 897.

Time and utility prevent review of the almost innumerable cases decided by the inferior admiralty courts which are more or less remotely related. Hence, petitioners omit additional references to judicial rulings in the belief that this Court has already decided the question in *The Valencia*, *supra*, and in *The Kate*, *supra*, against the existence of a maritime lien based upon supplies ordered by a charterer whose charter party obligated it "to provide and pay for" the same. And, after all (apart from judicial confusion), the question of authority arising from the charter party is the rather simple problem of the interpretation of most ordinary words requiring that the charterer "*shall provide and pay for all*" fuel. By this language the vessel owner obligated the charterer to make the arrangement for fuel and to bear the financial expense. By this language the vessel owner obligated the charterer to create and satisfy the debt. This obligation to the vessel owner having been performed, no maritime lien *could* arise, since the lien is merely a resultant right or remedy which is born with the debt and which must die when the debt is paid.

CONCLUSION.

Wherefore, petitioners pray:

(1) That this Court will conclude that respondent's oil contract negatived any maritime lien, and petitioners' charter party invested in the charterer no authority to create any maritime lien for fuel oil;

(2) That this Court will reverse the ruling and decision of the Circuit Court of Appeals for the Ninth Circuit;

(3) That this Court will direct the Circuit Court of Appeals for the Ninth Circuit to order a dismissal of both the libel against the "Brand" and the libel against the "Stjerneborg."

Respectfully submitted,

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APPENDIX.

Maritime Liens for Necessaries.

(Subsection P, Q, R, S and T of Section 30 of Merchant Marine Act of June 5, 1920; 46 U. S. C. secs. 971-975)

"Subsection P. Any person furnishing repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, to any vessel, whether foreign or domestic, upon the order of the owner of such vessel, or of a person authorized by the owner, shall have a maritime lien on the vessel, which may be enforced by suit *in rem*, and it shall not be necessary to allege or prove that credit was given to the vessel. (46 U. S. C. 971.)

"Subsection Q. The following persons shall be presumed to have authority from the owner to procure repairs, supplies, towage, use of dry dock or marine railway, and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted. No person tortiously or unlawfully in possession or charge of a vessel shall have authority to bind the vessel. (46 U. S. C. 972.)

"Subsection R. The officers and agents of a vessel specified in subsection Q shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel; but nothing in this section shall be construed to confer a lien when the furnisher knew, or by exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor. (46 U. S. C. 973.)

"Subsection S. Nothing in this section shall be construed to prevent the furnisher of repairs, supplies, towage, use of dry dock or marine railway, or other necessaries, or the mortgagee, from waiving his right to a lien; or in the case of a preferred mortgage lien, to the preferred status of such lien, at any time, by

agreement or otherwise; and this section shall not be construed to affect the rules of law now existing in regard to (1) the right to proceed against the vessel for advances, (2) laches in the enforcement of liens upon vessel, (3) the right to proceed *in personam*, (4) the rank of preferred maritime liens among themselves, or (5) priorities between maritime liens and mortgages, other than preferred mortgages, upon vessels of the United States. (46 U. S. C. 974.)

"Subsection T. This section shall supersede the provisions of all state statutes conferring liens on vessels, in so far as such statutes purport to create rights of action to be enforced by suits *in rem* in admiralty against vessels for repairs, supplies, towage, use of dry-dock or marine railway and other necessaries." (46 U. S. C. 975.)

The above provisions, sometimes referred to as being a part of the "Ship Mortgage Act of 1920" (279 U. S. 567) superseded, but substantially reenacted, the provisions of the 1910 "Maritime Lien Act", which read as follows:

"Act of June 23, 1910,
Ch. 373, 36 Stat. 604,

'An Act relating to liens on Vessels for repairs, supplies or other necessaries.'

"Section 1. That any person furnishing repairs, supplies, or other necessaries, including the use of dry dock or marine railway, to a vessel, whether foreign or domestic, upon the order of the owner or owners of such vessel, or of a person by him or them authorized, shall have a maritime lien on the vessel which may be enforced by a proceeding in rem, and it shall not be necessary to allege or prove that credit was given to the vessel.

"Section 2. That the following persons shall be presumed to have authority from the owner or owners to procure repairs, supplies and other necessaries for the vessel: The managing owner, ship's husband, master, or any person to whom the management of the vessel at the port of supply is entrusted. No person tortiously

or unlawfully in possession or charge of a vessel shall have authority to bind the vessel.

"Section 3. That the officers and agents of a vessel specified in Section 2 shall be taken to include such officers and agents when appointed by a charterer, by an owner *pro hac vice*, or by an agreed purchaser in possession of the vessel, but nothing in this Act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter party, agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessaries was without authority to bind the vessel therefor.

"Section 4. That nothing in this Act shall be construed to prevent a furnisher of repairs, supplies, or other necessaries from waiving his right to a lien at any time, by agreement or otherwise; and this Act shall not be construed to affect the rules of law now existing, either in regard to the right to proceed against a vessel for advances, or in regard to laches in the enforcement of liens on vessels, or in regard to the priority or rank of liens, or in regard to the right to proceed *in personam*.

"Section 5. That this Act shall supersede the provisions of all state statutes conferring liens on vessels in so far as the same purport to create rights of action to be enforced by proceedings *in rem* against vessels for repairs, supplies, and other necessaries."